

**IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

**IN RE: SHOW CAUSE
PROCEEDING AGAINST
TALK.COM D/B/A/ TALK
AMERICA, INC.**

) REC'D TN
) REGULATORY AUTH.
) DOCKET NO. 01-00216
) 02 FEB 13 PM 1 55
) OFFICE OF THE
EXECUTIVE SECRETARY

**TALK.COM'S OPPOSITION TO THE
CONSUMER SERVICES DIVISION'S MOTION TO COMPEL**

Respondent Talk.com Holding Corp. d/b/a Talk.com ("Talk.com" or the "Company"),¹ by its attorneys, hereby provides this formal opposition to the Motion to Compel ("Motion") filed by the Consumer Services Division ("CSD") on February 5, 2002.² As shown below, the CSD's Motion should be denied because its discovery requests are not directed to the issues in the 149-Count Show Cause Order³ and are not likely to lead to the discovery of evidence relevant to the Order's allegations. Notwithstanding the fact that CSD's requests are not proper, Talk.com voluntarily agrees to provide certain responses to the extent indicated below and stands willing to answer supplemental discovery requests that are re-formulated to address issues raised in the Show Cause Order.

¹ On April 9, 2001, Talk.com Holding Corp. changed its name to Talk America Inc. On May 7, 2001, Talk.com filed a request for name change to the TRA. On June 12, 2001, the Directors voted to defer a ruling on Talk.com's request to change its name and the TRA issued an order deferring such on October 12, 2001. *See Order Deferring a Ruling on Talk.com Holding Corp's Notice of Name Change* Docket No. 01-00410. Outside of Tennessee, Talk.com does business under the name "Talk America" in all states except Indiana (local service request pending; long distance name change approved) and Texas (name change awaiting final approval).

² On February 7, 2002, Talk.com filed a brief letter response to the CSD's Motion. *See* Letter from Steven A. Augustino, counsel for Talk.com, to David Waddell, Executive Secretary, TRA ("Letter Response"). Pursuant to Hearing Officer Hotvedt's Order of February 7, 2002, Talk.com files this formal response to the Motion.

³ *Order Requiring Talk.com to Appear and Show Cause why a Cease and Desist Order and/or Fine Should Not be Imposed*, Docket No. 01-00216 (issued November 8, 2001).

GENERAL RESPONSE

TRA Rule 1220-2.11 requires that discovery in contested cases before the agency be “effectuated in accordance with the Tennessee Rules of Civil Procedure.” *See* Initial Order Resolving Discovery Disputes and Suspending Procedural Schedule, at 3-4, Docket No. 97-00309 (issued September 17, 2001) (Director Malone, Hearing Officer). In general, Rule 26.02(1) of the Tennessee Rules of Civil Procedure permits parties to obtain any information that is relevant and not privileged. Tenn. R. Civ. P. 26.02(1). The scope of proper discovery, while broad, is not unlimited. For example, Rule 26.02(1) permits limitations on the discovery of information that is unreasonably cumulative or duplicative, obtainable from another source, or unduly burdensome.

Rule 26 also clearly requires that requested information be relevant. Relevance is determined on a case-by-case basis, with a view toward the issues raised in the particular proceeding. *See Duncan v. Duncan*, 789 S.W.2d 557, 560-561 (Tenn. Ct. App. Jan. 31, 1990) (“Rather than undertaking the impossible task of defining all the circumstances that might require discovery to be limited, the rules leave it to the trial court’s discretion to decide upon the discovery restrictions that might become necessary in a particular case” [quoting] *Strickland v. Strickland*, 618 S.W.2d 496, 501 (Tenn.Ct.App.1981) 4 J. Moore, J. Lucas & G. Grotheer, *Moore’s Federal Practice* ¶ 26.67 (2d ed. 1989); 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2036 (1970)”).

In this case, the relevance of the information requested must be framed by the Show Cause Order itself. The Show Cause Order asserts 149 counts of alleged violations, divided into three categories of violations of both the Tennessee Code and the

rules promulgated in furtherance of the Code. Only the first two categories are potentially implicated by the CSD's discovery requests.⁴

The first category of complaints relates to alleged violations of Tenn. Code Ann. § 65-4-125(a) and the associated TRA rules and regulations regarding the switching of telecommunication service providers for customers in Tennessee. The Show Cause Order identifies 64 counts of alleged violations stemming from 34 specific incidents of alleged slamming. The applicable legal standard for each of the slamming counts is whether Talk.com "knew or reasonably should have known" that the subscriber did not authorize the switch in question. Tenn. Code Ann. § 65-4-125(a). Discovery is appropriate in relation to the slamming allegations to the extent it leads to evidence that Talk.com knew or reasonably should have known *that the incidents in question* were not authorized. The CSD's vague assertion that its discovery is relevant to "the reasonableness of Talk.com's business practices" (*see, e.g.,* Motion at 7, 12) is not sufficiently focused on the slamming incidents to justify discovery in this case.

The second general category of complaints relates to alleged violations of Tenn. Code Ann. § 65-4-125(b) and the associated TRA rules and regulations relating to billing of services to customers in Tennessee. Here again, the legal standard is whether Talk.com knew or reasonably should have known that the subscriber did not authorize the services billed. Tenn. Code Ann. § 65-4-125(b). Discovery with respect to the cramming violations is appropriate to the extent it addresses the billing practices that are alleged with particularity in the Show Cause. Discovery would not be appropriate with respect to sales or billing practices not implicated in any of the cramming counts alleged.

⁴ With the exception of Interrogatory No. 7, the CSD did not propound any discovery requests intended to address the "Do Not Call" counts in the Show Cause Order.

Finally, as Talk.com noted in its *Letter Response*, it is not appropriate for the CSD to use discovery in this docket to investigate other activities that are not part of this docket and which have no bearing on the merits of the specific incidents alleged in the Show Cause. Discovery relating to potential violations not set forth in the Show Cause should not be allowed. *See, e.g.*, Motion at 9-10 (billing detail); at 11 (maintenance of complaint records); at 17 (additional promotional checks); at 18 (misleading or deceptive marketing). Moreover, discovery designed to identify other companies not named in the Show Cause also should not be allowed. *See, e.g.*, Motion at 6 (discovery aimed at “other corporate identities against which additional consumer complaints have been filed”); at 15 (seeking to investigate “the activities of other resellers that have been the subject of similar complaints and enforcement actions”). Such investigations, if CSD seeks to conduct them, should take place outside this Show Cause docket.

SPECIFIC RESPONSES

With the foregoing background, Talk.com provides its response to each of the specific requests for which the CSD seeks to compel production.

Request for Production No. 1: Request number 1 seeks production of “all documents reflecting the corporate structure and corporate formation as well as any reorganization or restructuring of Talk.com and any holdings or interest Talk.com has in other entities.”

CSD has not shown that this request is designed to lead to relevant or admissible evidence. First, CSD asserts that the information will lead to the identification of additional entities that have received complaints. CSD Motion at 6. An investigation of other entities should be made in a separate docket, however, and not in the context of this Show Cause proceeding. The CSD’s broad claim that identification of other entities will illuminate the “reasonableness of Talk.com’s business practices” similarly is without relevance to the Show Cause proceeding. Even assuming (i) there are additional entities that the CSD did not discover in the eight months of this investigation before the Show Cause was issued and (ii) those entities have engaged in other acts that may or may not violate the TRA’s rules, such actions of the other entities do not bear on whether Talk.com committed any of the acts identified in the Show Cause.

CSD’s remaining claim that the documents will bear on an appropriate penalty similarly does not justify discovery in this instance. CSD Motion at 6. Tenn. Code Ann. § 65-4-125(f) sets forth the standards the TRA is to apply in assessing a civil penalty, specifically mentioning that the TRA must consider “mitigation factors as raised by the telecommunications service provider” in assessing a penalty. CSD’s explanation does not identify how Talk.com’s corporate structure can bear on those “mitigation factors”

nor does it appear likely that structural issues will be at all relevant to such mitigation factors.

Notwithstanding these objections, Talk.com notes that it is a wholly owned subsidiary of Talk America Holdings Inc. ("Talk America"). Talk America is a publicly traded entity appearing on the NASDAQ under the symbol "TALK." Documents responsive to CSD's request are available through the Securities and Exchange Commission's EDGAR database, at the Company's web page www.talk.com, as well as numerous private entities that track the stock of Talk America. Talk.com respectfully refers the CSD to these sources for the information requested.

Request for Production No. 2: Request for production number 2 seeks "all documents, including but not limited to contracts, relating to or describing the relationship between Talk.com" and several local exchange carriers. CSD asserts only that this request might "allow the CSD to determine whether there is a contractual basis for some of Talk.com's business practices." CSD Motion at 7. Talk.com respectfully submits that this cryptic assertion does not demonstrate that the information is relevant to any issue in this proceeding. Talk cannot discern (nor, apparently, can the CSD) which, if any, "business practices" the request refers to, nor how such practices might relate to the slamming or cramming allegations set forth in the Show Cause. CSD's request for production should be denied.

Request for Production No. 3: This request seeks a variety of advertisements, scripts or other marketing materials. The CSD, citing its authority to "monitor [solicitations] and enforce the law," seeks copies of all such documents. CSD Motion at 8. However, as noted above, the CSD is able to open a separate investigation if it wishes

to investigate Talk.com's general business practices. Indeed, the CSD's assertion that "many of the allegations in the Show Cause Order are associated with [Talk's] financial inducements" merely proves Talk.com's point. The CSD can investigate those allegations through discovery, if it wishes. However, Talk.com submits that the CSD should re-state this request to relate to those allegations. If it did (and assuming the request is not burdensome or otherwise objectionable), Talk.com would supply the requested information.

Request for Production No. 4: This request seeks documents "relating to any comparison of the local and additional feature rates of any other local exchange company with those of Talk.com in Tennessee." The CSD asserts that "some" of the telemarketing and third party verification scripts "include a statement that consumers will save 10% of their local telephone bill" by switching, and further asserts that "the Show Cause includes allegations that Talk.com failed to provide the promised 10% discount." CSD Motion at 9. Talk.com has reviewed Counts 65 through 93 of the Show Cause Order, which represent all of the cramming allegations asserted against Talk.com. *See* Show Cause Order at pp. 40-68. Not one of those Counts alleges that Talk.com failed to deliver a 10% savings. CSD's request to investigate this allegation simply is beyond the scope of this docket.

Request for Production No. 5: This request seeks all documents "referencing, explaining or promoting" any services other than local and long distance telephone service. CSD claims that this request relates to charges on Talk.com bills that allegedly are "confusing or incomprehensible." CSD Motion at 9. None of the cramming Counts

make any such allegations, however. *See* Show Cause Order at pp. 40-68. Accordingly, CSD's request to investigate this allegation is beyond the scope of this docket.

Request for Production No. 6: Talk.com will provide the tax forms identified in this request.

Request for Production No. 7: This request is divided into several subparts, which the CSD addresses separately. With respect to subpart (a) ("order entry functions, customer cancellation [sic] service and consumer complaints"), the CSD asserts that the documents are relevant to allegations that Talk.com billed consumers after cancellation of their service. CSD Motion at 11. Talk.com will provide copies of responsive documents that relate to Talk.com's cancellation of service and receipt and processing of cancellation requests. Talk.com submits that "order entry" and "consumer complaint" processes are not relevant to the cancellation allegations in the Show Cause Order.⁵

With respect to subpart (b) (seeking copies of complaints), CSD asserts that it seeks this information to determine whether Talk.com is complying with Tenn. Comp. R. & Reg. 1220-4-2-.56(12), which requires carriers to maintain a record of complaints for two years. CSD Motion at 11. The Show Cause Order does not contain any allegations with respect to this rule, however. Accordingly, CSD's request to investigate this allegation is beyond the scope of this docket.

With respect to subpart (d), the CSD admits that it seeks this information in order to investigate complaints *other than* "those that provide the basis for this proceeding."

⁵ Talk.com notes that it is unable to switch a customer's telecommunications services to another carrier once a customer requests cancellation. Thus, Talk.com cannot submit an order to BellSouth (or any other carrier) in response to a cancellation request and Talk.com's "order entry" procedures are irrelevant to the cancellation allegations. The actual movement of a customer to a different carrier is entirely in the control of the customer, his preferred carrier and/or the executing LEC.

CSD Motion at 12. Accordingly, CSD's request to investigate this allegation is beyond the scope of this docket.

Request for Production No. 8: This request seeks documents related to investigations of Talk.com by "any state or federal civil or criminal law enforcement entity or agency." CSD claims that this request is designed to determine whether "the conduct alleged against Talk.com in Tennessee is isolated or is a pattern evident in other states in which Talk.com operates." CSD Motion at 12. The CSD is without jurisdiction to regulate the activities of Talk.com with respect to interstate services or services provided in other states. Moreover, Talk.com's activities in other states (or with respect to interstate services) do not affect whether Talk.com's activities *in Tennessee* violated any Tennessee rules. Therefore, CSD's attempt to obtain information is both beyond its jurisdiction and is irrelevant to determining the lawfulness of Talk.com's activities within the state of Tennessee.

Request for Production No. 9: This request seeks documents "used by Talk.com or those acting on its behalf as training materials" for various sales-related purposes. In its Motion, CSD offers only the vague assertion that this information is "probative of the company's efforts to train employees and ensure their awareness of applicable state and federal rules and laws." CSD Motion at 13. Talk.com submits that this assertion is not sufficiently tied to any specific practices or allegations raised in the Show Cause. Indeed, it appears to seek information to determine whether Talk.com is complying with federal rules and laws, which are beyond the CSD's jurisdiction to enforce. Talk.com respectfully submits that CSD should re-state this request in a manner that directs it toward a specific allegation raised in the Show Cause proceeding.

Interrogatory No. 2: This request asks Talk.com to identify “any person or entity entering into a contract, agreement, or understanding with Talk.com involving solicitations and verifications made or caused to be made directly or indirectly on behalf of Talk.com to persons in Tennessee.” CSD asserts that this information is “probative of whether Talk.com engaged in a pattern of disregarding the rules regulating solicitations and verifications.” CSD Motion at 14. The CSD does not identify, however, which solicitations or verifications this request is addressed to, nor does it even attempt to limit the request to solicitations or verifications made to the individuals who allege that Talk.com improperly switched their service. Moreover, Talk.com has reviewed the slamming counts specified in the Show Cause (Counts 1-64). None of those Counts allege that Talk.com or its representatives deviated from written scripts in soliciting or verifying telecommunications change orders. *See* Show Cause Order at pp. 4-39. Thus, it does not appear that the information requested will lead to the discovery of any evidence relevant to the actual solicitations in issue. Accordingly, Talk.com submits that this request should be denied.

Interrogatory No. 3: This request seeks a wide variety of information generally related to Talk.com’s authorizations in other states and to its current and past officers and directors. CSD offers that information relating to Talk.com’s operations in other states may be relevant to the “reasonableness of its business practices.” CSD Motion at 15. As with Request for Production No. 8, such information both is beyond the CSD’s jurisdiction and is not relevant to Talk.com’s activities within Tennessee. CSD further contends that information concerning officers and directors may enable it to take enforcement action against “other resellers that have been the subject of similar

complaints and enforcement actions.” CSD Motion at 15. Talk.com submits that investigations against other entities are beyond the scope of this docket. If CSD seeks to investigate other entities, it can and should open a separate investigation to do so.

Notwithstanding these objections, Talk.com is willing to provide a list of states in which it is authorized to provide telecommunications services. Talk.com respectfully refers the CSD to the Securities and Exchange Commission’s EDGAR database for other information concerning the officers and directors of Talk.com’s publicly traded parent, Talk America.

Interrogatory No. 4: This request seeks an alphabetical listing of (a) all persons who were solicited by Talk.com, (b) who have cancelled service, or (c) who have “registered, filed or expressed complaints” against Talk.com concerning promotional checks. Talk.com has over 1.5 million customers nationwide. An alphabetical listing of all persons solicited by Talk.com and/or who have cancelled service (for whatever reason) literally is likely to run into the several millions, if not tens of millions, of persons. Talk.com objected on grounds of relevance to such a broad, unfocused request.

In its Motion, the CSD appears to narrow the request to relate to the total *number* of cancellations and the total number of promotional checks sent by Talk.com. CSD Motion at 16. Talk.com is willing to discuss this narrowing with the CSD staff, and may be able to provide some of the information it seeks.

Interrogatory No. 5: The CSD raises only two arguments in support of the information requested in this interrogatory. First, the CSD asserts that it needs to know the identities of individuals who created Talk.com’s advertising materials to “assist the CSD in assuring that it has obtained all the material it is entitled to review and verified

Talk.com's compliance with Tennessee law and regulations." CSD Motion at 17. Talk.com submits that the CSD has not shown this information is relevant to any specific issues in the Show Cause.⁶ Although Talk.com does not dispute the CSD's ability to investigate Talk.com's compliance with Tennessee law and regulations, such investigations should occur in a separate proceeding, not as part of an open-ended Show Cause docket. Unless the CSD re-states this portion of the interrogatory to deal with activities alleged in the Show Cause, the CSD's request should be denied.

Second, with respect to the remainder of this interrogatory, the CSD asserts that the information is necessary to "investigate whether additional promotional checks distributed by or on behalf of Talk.com violate the regulations as well." CSD Motion at 17. As with other such investigations, Talk.com submits that this information is beyond the scope of this docket. Accordingly, CSD's request should be denied.

Interrogatory No. 6: According to the CSD, this request seeks information relating to the veracity of a claim that consumers will save 10% by switching to Talk.com. CSD Motion at 18. For the reasons explained in connection with CSD Request for Production No. 4, CSD's request is beyond the scope of this proceeding. Accordingly, its request should be denied.

Interrogatory No. 7: The CSD asserts that this interrogatory is intended to determine whether Talk.com's activities are "isolated to Tennessee or [are] more pervasive."⁷ For the reasons explained in connection with Request for Production No. 8, this information is irrelevant and beyond the CSD's jurisdiction to enforce.

⁶ Moreover, Talk.com fails to see how identification of the requested persons will assure the CSD it has obtained the unspecified "material it is entitled to review." This aspect of the CSD's request is pure conjecture at best.

Interrogatory No. 8: This requests seeks information relating to the name and addresses of past and present employees of Talk.com. The CSD offers only the barest of speculation that this information will enable it to obtain information relating to the "instructions and training" provided by Talk.com. CSD Motion at 20. Talk.com submits that even under the broadest interpretation of permissible discovery, this request is nothing more than the classic "fishing expedition." There is no basis for enabling the CSD to contact past and present employees of Talk.com in the hopes of uncovering embarrassing information that it might somehow try to use in this proceeding.⁷

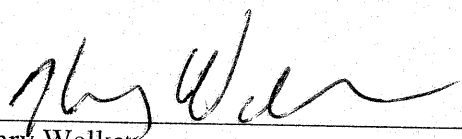
CONCLUSION

For the foregoing reasons, the CSD's Motion to Compel should be denied.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____


Henry Walker
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2363

Of Counsel
Steven A. Augustino
Erin W. Emmott
KELLEY DRYE & WARREN LLP
1200 19th Street
Suite 500
Washington, DC 20036
(202) 955-9600 (O)
(202) 955-9792 (F)

⁷ It would, of course, be impermissible for the CSD to contact employees of Talk.com, who are known to be represented by the undersigned counsel in connection with this proceeding. Thus, the information could not be used for the purposes the CSD suggests in any event.

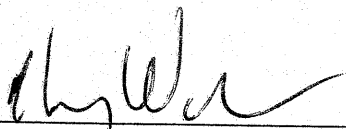
Francie McComb
Associate General Counsel
Talk America Inc.
6805 Route 202
New Hope, PA 18938
(215) 862-1517 (O)
(215) 862-1960 (F)

Dated: February 13, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been delivered via fax or hand delivery and U.S. mail to the following on this the 13th day of February, 2002.

Timothy C. Phillips, Esq.
Deputy Attorney General
Consumer Advocate & Protection Division
Office of the Attorney General, State of Tennessee
P.O. Box 20207
Nashville, Tennessee 37202


Henry Walker